GULWANT SINGH v. AMAR KAUR

[A.C.J. (Raja Azlan Shah J.) November 2, 1967]
[K.L. — Civil Appeal No. 25 of 1966]

Moneylender — Unsigned statement of account attached to statement of claim — Whether to be signed by moneylender or agent — Moneylenders Ordinance, 1951, ss. 19(1) and 21 (1).

The plaintiff, a moneylender, appellant herein sought to recover a loan he made to the defendant. In his statement of claim, he averred *inter alia* that the defendant had so far paid nothing towards account of principal or interest, and he attached therewith a copy of the statement of account under the Moneylenders Ordinance. The statement was not signed either by him or his agent. At the trial before the learned magistrate a preliminary objection was taken to strike out the statement of claim on the ground that the statement of account was not signed by the moneylender or his agent as required by section 21(1) of the Ordinance. The learned magistrate upheld the objection. On appeal by the plaintiff:—

Held: in this case as the statement of account was referred to in the statement of claim it became part and parcel of the statement of claim and therefore it was immaterial whether it was signed or it was produced by the moneylender himself or by his solicitors who must be deemed to be his agents for the purpose of instituting the proceedings.

Cases referred to:—

(1) *Arjan Singh* v. *Hashim Angullia* [1941] M.L.J. 55.

(2) *Ramasamy Chettiar* v. *Wong Poh Fatt* [1960] M.L.J. 43.

(3) *Teja Singh* v. *Rattan Singh* [1961] M.L.J. 39.

(4) *Palaniappa Chettiar* v. *Tan Jan* [1965] 1 M.L.J. 182.

(5) *Karuthan Chettiar* v. *Parameswara Iyer* [1966] 2 M.L.J. 151, 153.

(6) *Lewis* v. *Packer* [1960] 1 All E.R. 720.

(7) *In Re Hinchliffe* [1895] 1 Ch. D. 117, 120.

(8) *Grant Australian Gold Mining Co.* v. *Martin* (1877), 5 Ch. D. 10.

(9) *Day* v. *William Hill* [1949] 1 All E.R. 219, 221.

MAGISTRATE'S CIVIL APPEAL.

K. L. Devaser for the appellant.

J. Nadchatiram for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: This appeal brings in review the scope and effect of the provisions of sub-section (1) of section 21 of the Moneylenders Ordinance, 1951. The one vital question that arises is whether a statement of account which is attached to the statement of claim must be signed by the moneylender or his agent.

Shortly stated, the facts are as follows. The plaintiff, a licensed moneylender, filed his statement of claim against the defendant for the recovery of a loan under the Moneylenders Ordinance. Paragraph 4 thereof, which is the crux of this appeal, avers that the defendant has so far paid nothing towards account of interest and/or towards account of principal; a copy of the statement of account under the Moneylenders Ordinance, 1951, is attached and marked "P.2". The statement of account is in the form in the First Schedule to the Ordinance, but it was not signed by the plaintiff or his agent. At the trial before the learned magistrate a preliminary objection was taken to strike out the statement of claim on the ground that the statement of account was not signed by the moneylender or his agent as required by section 21(1) read with section 19(1). The learned magistrate upheld the objection and the plaintiff now appeals to this court.

It can no longer be said that the moneylender is being taken by surprise by a new technical defence. As long ago as 1941 it was perfectly clear to the moneylending community that the particulars in the statement of account as prescribed in section 7(1) of the Straits Settlements Moneylenders Ordinance (Cap. 218) which is in *pari materia* with section 19(1) of our Moneylenders Ordinance should accompany the writ, and non-compliance with the statutory requirement is an irregularity which the court cannot waive and will entitle a defendant to have the writ set aside with costs: see *Arjan Singh* v. *Hashim Angullia.*[1] In that case the action was commenced by a writ of summons. The principle in *Arjan Singh's* case has been extended to cover a case commenced by way of an originating summons (*Ramasamy Chettiar* v. *Wong Poh Fatt* [2]). One year later, the Court of Appeal affirmed the principle laid down in both the earlier cases: see *Teja Singh* v. *Rattan Singh.*[3] In my view, those cases do not go so far as to bear out the proposition that the statement of account which accompanies the writ of summons must be signed. That cannot be extracted from the judgments. My attention was drawn to the case of *Palaniappa Chettiar* v. *Tan Jan* [4] in which the Federal Court held that an unsigned statement of account under section 21 of the Moneylenders Ordinance exhibited to an affidavit which supported the originating summons was part of the affidavit and the signature attached to the affidavit as a whole and to every part of it, and therefore the provisions of section 21 of the Moneylenders Ordinance has been complied with.

Counsel for the respondent places reliance on the other point canvassed before the court, and that was that by reason of the Schedule to the Moneylenders Ordinance, which sets out the form of the certificate under sections 19 and 21 and which contains no place for a signature, there was no necessity for the certificate under section 21 to be signed. The court took the view that a statement in the form set out in the Schedule "is a statement within the meaning of the word 'statement' as used in section 19, but it does not in any way dispense with the necessity for that statement having been drawn up in the form in the Schedule and then be signed".

The contention of counsel for the appellant to which I now turn derives from an observation of Gill J. in *Karuthan Chettiar* v. *Parameswara Iyer* (5) where the learned judge took the view that the statement of account exhibited to the statement of claim which was not signed by the plaintiff or his agent was not fatal to the plaintiff's case so long as "the statement of account was produced by the moneylender or his moneylending agent or their solicitors, who must be treated as their agents for the purpose of production of the accounts".

In my view, *Palaniappa Chettiar*'s case can be explained in this way. It was a case commenced by way of originating summons supported by affidavit to which an unsigned statement of account was exhibited (R.S.C., O. 55 r. 5a). As the originating summons is not a statement of claim and therefore not a pleading (see *Lewis* v. *Packer* (6)), the statement of account does not form part and parcel of the summons and therefore the statement of account must be signed in accordance with section 21. That seems to be the *raison d'etre* underlying the second limb of the judgment in that case. But the matter does not rest there. In the circumstances of the case, the court went further to hold that on the authority of *In Re Hinchliffe* (7) an exhibit to an affidavit and therefore the unsigned statement of account referred to in the affidavit was part and parcel of the affidavit with the result that the said statement is in compliance with section 21.

The present case is different. It was commenced by a statement of claim signed by the moneylender's solicitors. The signature is a voucher that the case is not a mere fiction (*per* James L.J. in *Grant Australian Gold Mining Co.* v. *Martin* (8)). The statement of claim is a pleading. Any document referred to in the pleading becomes part and parcel of the pleading (see *Day* v. *William Hill* (9)). Therefore the statement of account becomes part and parcel of the statement of claim. In the circumstances I am in accord with the observation of Gill J. in *Karuthan Chettiar* v. *Parameswara Iyer*, *supra*, that as long as the statement of account is produced, that is, it is attached to the statement of claim, that is in compliance with the provisions of section 21 and it is immaterial whether it is produced by the moneylender himself or by his solicitors who must be deemed to be his agents for the purpose of instituting the proceedings. The present appeal is sufficient to dispel the specious doctrine that an unsigned statement of account attached to a statement of claim transgresses the provisions of section 21.

I will therefore allow the appeal with costs. As the learned magistrate has been posted elsewhere in a different capacity, this case should be tried before another magistrate.

Appeal allowed. Re-trial ordered.

Solicitors: *K. L. Devaser & Co.; Nadchatirams.*

ISMAIL v. HASNUL; ABDUL GHAFAR v. HASNUL

[F.C. (Azmi C.J. (Malaya), Raja Azlan Shah & Gill JJ.) November 17, 1967]

[K.L. — Federal Court Civil Appeal No. X. 70 & X. 63 of 1967]

Practice and Procedure — Subpoena ad testificandum enforcing attendance of witness — Application to set aside — Court's power to restrain abuse of power.

Evidence Ordinance 1950, s. 11 — Scope of.

An action for slander was brought by Tun Tan Siew Sin, Minister of Finance against the respondent in Civil Suit No. 38 of 1964. The respondent totally denied making the defamatory statements which were published in *Utusan Melayu* and imputed to him. In order to establish this line of defence, the respondent intended to call the appellants as his witnesses to testify that on other occasions *Utusan Melayu* had published defamatory statements purported to have been made of the respondent by the appellants and subsequently the appellants had requested *Utusan Melayu* to publish denials of such statements. Writs of *subpoena ad testificandum* were accordingly issued and served on the appellants requiring their attendance to give evidence for the defence at the trial of the slander action. Both appellants separately applied by summons in chambers to set aside the writs as vexatious and an abuse of the process of the court. These applications being adjourned into open court and heard, were dismissed by the judge ([1967] 2 M.L.J. 191).

On appeals by the appellants before the Federal Court, the question for decision was whether the issue of these *subpoenas* on the appellants was an abuse of the process of the court.

Held: (1) in the pending action whether or not the plaintiff had slandered the respondent was the main issue. Both the appellants in their affidavits, denied knowledge or their ability to give evidence on any relevant issue in such action, further the 1st appellant categorically denied ever requesting *Utusan Melayu* at any time to make corrections of defamatory statements. The evidence which the respondent was seeking to establish was evidence of collateral facts not reasonably conclusive even if established, and which have no connection with the main fact in the defamation suit. It was therefore, not apparent in what way the appellants could give any relevant evidence to assist the defence;

(2) for the above reasons it is difficult to see in what way the appellants can give relevant evidence to assist the defence. In the particular circumstances of this particular case the court has a right to protect the appellants from the practice and process of this court being used simply for a matter that is misconceived and not for the purposes of justice.

Per Raja Azlan Shah J.: "The practice in all courts has been that a *subpoena* may be issued against anybody, be he a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse."